Supreme Court, U.S.
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No. 01-323

In The

Supreme Court of the United States

ELIZABETH WINKER,

Petitioner,

v.

MCDONNELL DOUGLAS CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Winker, a former union employee of McDonnell Douglas Corporation ("MDC") was discharged from MDC on December 4, 1995 due to excessive absenteeism and in accordance with the terms of a collective bargaining agreement ("CBA"). Winker maintains that MDC discharged her due to her bi-polar condition, in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12101 *et seq.*, 29 U.S.C. §794(a) (the "Rehab Act"), the Missouri Human Rights Act ("MHRA"), Mo. Rev. Stat. Ch. 213, and Section 301 of the Labor Management Relations Act, 29 U.S.C. §185.[1]

Winker began working for MDC on March 17, 1986 as a member of the International Association of Machinists and Aerospace Workers, District Lodge 837 ("Union"). Winker worked as a sheet metal worker on the F-15, F-18, and the Harrier programs.

Winker's bi-polar condition causes her to experience alternating but severe manic and depressive states. For example, Winker admits that suicidal tendencies are not uncommon for her. Winker acknowledged that her bi-polar condition causes significant swings in her physical state as well:

- "Because of my illness you stay up for three days, sleep a day, up for five days, sleep for two days."

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[1] Winker originally also asserted her claims against MDC's parent company, The Boeing Company. Those claims were dismissed and are not at issue here.

- "It's like being a veteran that is disabled in a wheelchair or someone with arthritis. You know that some days you are going to feel good and other days that arthritis is just going to kill you. And some days you know you are going to be okay living in a wheelchair and other days you're going to say, oh, I wish I would have never went to Vietnam. Like I told you today, I'm manicky. Tomorrow I could be depressed and be laying on the couch all day. I don't know. You don't know what you're going to be from one day to the next."

- "I don't know if I can show up for a job. I don't know if I can work 40 hours a week. I don't know anything. I don't trust myself."

As a result, Winker is unable to function normally for long periods of time. She admits that medications do not improve her condition and that she cannot even predict her condition from one day to the next. Winker's treating physicians do not believe she can work, and they feel Winker's condition will only deteriorate. Winker, in fact, has not worked in any substantial capacity since leaving MDC in 1995.

Even as early as 1993, while still working for MDC, Winker applied for disability benefits from the Social Security Administration. In her application for disability benefits, Winker asserted her inability to work since September of 1993. Winker began receiving benefits in 1994.

Not surprisingly in light of her severe bi-polar condition, Winker had an exceedingly poor attendance record during much of her employment at MDC. In her final

year of employment alone, Winker was absent approximately 238 days, or 65% of that year:

Date of Absence	Type of Absence
11/21/94	Full Day
12/05/94	Partial
12/06/94	Partial
12/12/94	Full Day
12/13/94	Full Day
12/14/94	Partial
01/04/95	Partial
01/06/95	Partial
01/11/95	Full Day
01/12/95	Full Day
01/13/95	Full Day
01/16/95	Full Day
01/19/95	Full Day
01/23/95	Full Day
01/24/95	Full Day
01/27/95	Full Day
02/01/95	Partial
02/07/95	Full Day
04/08/95	Partial
04/19/95	Partial
04/24/95	Partial
05/08/95	Partial
05/15/95	Full Day
05/23/95	Partial
05/24/95	9-Day Leave of Absence
06/09/95	Full Day
06/10/95	Full Day
06/14/95	Partial
06/17/95	Full Day
06/19/95	5-Month Leave of Absence

This undisputed absenteeism caused Winker's eventual discharge.[2]

As a union member, Winker was subject to the CBA between MDC and the Union, including a no-fault attendance policy with progressive discipline for unexcused absences:

Total cumulative Days Absent	Action
3	Oral Warning (Record of Unsatisfactory Performance or "RUP")
5	First Written Warning (Employee Incident Report or "EIR")
7	Second Written Warning (EIR)
9	Third (*Final*) Written Warning (EIR)
10	Up to and Including Discharge

By June 1995 Winker was placed on "final warning" status due to her absences.[3] Two days after receiving her final warning, Winker was absent from work on June 14,

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[2] Notably, MDC tried to assist Winker and accommodate her in many ways. After she was discharged for failing to return to work following an extended leave of absence in July 1994, MDC reinstated Winker. MDC also granted a request by Winker in early 1995 to switch from first to second shift, which Winker believed better suited her bi-polar condition. MDC personnel also referred Plaintiff to MDC's Employee Assistance Program on several occasions.

[3] For purposes of the attendance policy, absences are counted during a twelve-month period beginning on the employee's anniversary date. Winker's anniversary date at the time was January 9. In addition, medical leave of absence counted as only one-day's absence under MDC's attendance policy.

1995, did not work the following Saturday, June 17, 1995 (a scheduled work day for Winker), then began a leave of absence the next Monday, June 17, 1995, which lasted for over five months. Winker did not return to MDC until December 4, 1995.

Pursuant to its attendance policy, MDC discharged Winker, effective upon her return in December 1995, which allowed Winker to retain insurance coverage throughout that five-month period when she did not work. Winker filed a grievance with her union regarding her discharge, but the Union withdrew the grievance as unsustainable.

In June 1997, approximately eighteen months after her discharge, Winker first filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), claiming discrimination and harassment on the bases of sex and disability. Winker filed this lawsuit on September 19, 1997.

The United States District Court for the Eastern District of Missouri dismissed Winker's MHRA and ADA claims as untimely. In a dual-filing state such as Missouri, in order to bring suit under the ADA, an individual must, among other requirements, file a charge of discrimination with the EEOC within 300 days of the alleged unlawful adverse action. *See Conner v. Reckitt & Colan, Inc.*, 84 F.3d 1100, 1104 (8th Cir. 1996). The time limit for filing under the MHRA is 180 days. Mo. Rev. Stat. §213.075.

Likewise, the District Court dismissed Winker's LMRA claim for failure to file suit within the LMRA's applicable six-month statute of limitation. *See DelCostello v. Int'l Brotherhood of Teamsters*, 462 U.S. 151, 169 (1983).

The District Court later granted summary judgment to MDC as to Winker's remaining Rehab Act claim, finding that Winker was not a qualified individual with a disability in light of her absenteeism and inability to work.

On appeal the United States Court of Appeals for the Eighth Circuit affirmed the District Court's rulings. The Eighth Circuit also denied motions by Winker to introduce additional evidence, for reconsideration, and for rehearing *en banc*.[4]

SUMMARY OF THE ARGUMENT

This Court should deny Winker's petition for a writ of certiorari. The lower courts properly dismissed Winker's claims. Moreover, Winker's petition does not set forth sufficient grounds or compelling reasons to grant a writ of certiorari. If accepted for review, this case would involve matters applicable and relevant only to the parties in this case. Accordingly, Winker's petition should be denied.

Essentially, Winker claims that the lower courts should have applied equitable tolling to resurrect her ADA, MHRA and LMRA claims because she was unaware of administrative exhaustion requirements,

[4] Winker was represented by counsel throughout the proceedings in the District Court. Winker parted with counsel immediately after the Eighth Circuit's initial affirmance of the District Court's dismissal and remains *pro se*.

which she primarily attributes to her then-attorney's negligence, as well as to erroneous advice from her union representative. As for her Rehab Act claim, Winker merely disputes the District Court's computation of her absenteeism. These arguments are not sufficient grounds for granting Winker a writ of certiorari.

Winker's contention that the District Court should have applied equitable tolling to her untimely ADA and MHRA claims is not a sufficient ground for granting a writ of certiorari. An alleged misapplication of law will generally not support a writ of certiorari. Supreme Court Rule 10. Further, Winker's assertions that she was ignorant of the EEOC's procedures (particularly due to alleged attorney negligence and poor advice from her union representative), and that such purported ignorance is the reason for her untimely charge of discrimination, are factually incorrect. Winker's position is also legally incorrect; a litigant cannot invoke equitable tolling based upon her attorney or union representative's negligence.

Winker's contention that the District Court also improperly failed to apply equitable tolling to resurrect her untimely LMRA claim fails for similar reasons. Negligence of counsel cannot support a claim of equitable tolling under the LMRA.

Finally, Winker's contention that the District Court erred in ruling that she was not a qualified individual for purposes of her Rehab Act claim due to her excessive absenteeism is also not a proper basis to grant a writ of certiorari. Not only is an alleged factual mistake insufficient to grant Winker's petition, but she is the one who is factually mistaken. The District Court did not err in its

factual account of Winker's absenteeism. Further, even if imperfectly computed, Winker's absenteeism was unequivocally excessive and, as a matter of law, it rendered her unqualified for her position and unable to sustain a claim of discrimination.

Accordingly, for each of these reasons Winker's petition for a writ of certiorari should be denied.

ARGUMENT

Winker's petition for a writ of certiorari should be denied. Supreme Court Rule 10 states that "only for compelling reasons" will a writ of certiorari be granted and sets forth such reasons. Winker's petition does not set forth any of the reasons outlined in Rule 10. It also fails to present any compelling reasons justifying a writ of certiorari.

Winker appears to offer three reasons in her petition seeking a writ of certiorari: (1) the District Court improperly failed to apply the doctrine of equitable tolling to her untimely ADA and MHRA claims; (2) the District Court also should have applied equitable tolling to her untimely LMRA claim; and (3) the District Court incorrectly found that Winker was not qualified for her position (for purposes of her Rehab Act claim) due to her excessive absenteeism. Winker's contentions are not sufficient grounds, either individually or cumulatively, to grant her a writ of certiorari.

1. Winker's contention that the District Court should have invoked equitable tolling as to her untimely ADA and MHRA claims is not a sufficient ground for granting a writ of certiorari.

Winker's contention that the District Court should have invoked equitable tolling as to her untimely ADA and MHRA claims is not a sufficient ground for granting a writ of certiorari. Specifically, Winker asserts that at the time of her discharge she was "ignoran[t] of the EEOC" and thus did not file a timely charge of discrimination. Winker petition at 4. Additionally, Winker asserts that her counsel at the time improperly failed to apprise the District Court of her prior ignorance of the EEOC (*i.e.*, attorney negligence), which she also contends constitutes sufficient grounds for applying equitable tolling. *Id.*

Winker's contentions fail to support her petition for at least three reasons. First, Winker's assertion in itself is insufficient to support a writ of certiorari. At most, Winker contends that the District Court misconstrued (or was not sufficiently presented) the facts and also misapplied the law. Supreme Court Rule 10 specifically states that the Court will "rarely" grant a petition for a writ of certiorari in such circumstances. There are no otherwise compelling circumstances in this case warranting detour from that edict. For this reason alone, Winker's petition should be denied.

Second, Winker's assertion that she was, in fact, ignorant of the EEOC's procedures, and that such purported ignorance is the reason for her untimely charge of discrimination, is factually incorrect. Winker previously admitted before the District Court that she did not file a

timely charge of discrimination following her discharge strictly because her union representative instructed her not to do so until her grievance was resolved. *See* Memorandum of Law in Support of Plaintiff's Response to Defendants' Joint Motion to Dismiss, at 7-8; Winker affidavit, dated December 9, 1997, attached to Memorandum of Law in Support of Plaintiff's Response to Defendants' Joint Motion to Dismiss, at ¶¶ 8-9. Winker's failure to act was not due to purported ignorance of the EEOC or its processes, but was due to advice she had received from her union.

Winker followed her union representative's advice to await resolution of her grievance, after which she immediately attempted to assert her claim to the EEOC: "After learning that my grievance proceedings had been exhausted, I immediately proceeded to the EEOC and filed my complaint against my employer." *Id.* at ¶ 11. Thus, Winker has stated neither adequate nor correct facts to sustain her petition for a writ of certiorari.[5]

Third, Winker's contention that the District Court should have excused the untimeliness of her ADA and MHRA claims due to attorney or union representative negligence is legally insufficient. As the District Court properly held, a litigant cannot invoke equitable tolling based upon her counsel's negligence. *Gilbert ex rel. Gilbert*

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[5] Ironically, in the case cited by Winker in her petition, *Chakonas v. City of Chicago*, 42 F.3d 1132 (7th Cir. 1994), the court specifically held that equitable tolling was ***not*** applicable to the plaintiff's untimely discrimination claim, as the plaintiff was found to have been aware of the existence of a possible claim of discrimination but did not act timely upon the matter. *Id.* at 1135-36. Winker's allegations are quite similar to those in *Chakonas*.

v. Secretary of Health & Human Servs., 51 F.3d 254, 257 (Fed. Cir. 1995). Accordingly, Winker's petition should be denied.[6]

2. Winker's contention that the District Court should have invoked equitable tolling as to her untimely LMRA claim is also an insufficient basis for granting a writ of certiorari.

Winker's contention that the District Court also improperly failed to apply equitable tolling to resurrect her untimely LMRA claim is not a sufficient ground to grant a writ of certiorari. Winker claims that her attorney negligently allowed the applicable six-month statute of limitations period to expire, rendering her LMRA claim untimely. Accordingly, Winker contends that the District Court should have applied equitable tolling. Winker's argument is not sufficient grounds for granting her petition for a writ of certiorari.

Winker's argument in this regard again merely disputes the lower courts' application of a correctly-stated

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[6] In addition, unlike under the ADA, a timely-filed charge of discrimination is a jurisdictional prerequisite for maintenance of an MHRA claim. *Hill v. St. Louis University*, 123 F.3d 1114, 1121, 1118 (8th Cir. 1997); *Tapp v. St. Louis University*, 78 F. Supp.2d 1002, 1011 (E.D. Mo. 2000). Therefore, Winker could not invoke equitable tolling regarding her Missouri state law claim under any circumstances.

Moreover, even if considering the merits, Winker's ADA and Missouri's state law MHRA claims would still fail. Just as the District Court properly found that Winker was not qualified for her position for purposes of the Rehab Act, the same finding precludes Winker's ADA and MHRA claims, which utilize a similar analytical scheme and burden of proof.

rule of law, which does not constitute a compelling reason justifying a writ of certiorari. S. Ct. Rule 10.

Furthermore, the District Court correctly declined to invoke equitable tolling regarding Winker's LMRA claim. As stated above, application of equitable tolling cannot be based upon the negligence of the petitioning party's counsel. *Gilbert*, 51 F.3d at 257. Therefore, Winker's petition should be denied.

3. Finally, Winker's contention that the District Court erred in ruling that she was not a qualified individual for purposes of her Rehab Act claim due to her excessive absenteeism is not sufficient to grant a writ of certiorari and is factually and legally incorrect.

Finally, Winker contends that the District Court erred in ruling that due to her excessive absenteeism she was not a qualified individual for purposes of her Rehab Act claim. Even if true, this is not a proper basis to grant a writ of certiorari. Moreover, the allegation is also factually and legally incorrect. Winker contends that the District Court incorrectly calculated her total absences (238 days in her final year of employment as opposed to 205 days in that time) and that the District Court incorrectly determined her number of absences under the applicable company rules. Winker petition at 4-5. Once more, Winker's contention is no more than a dispute with the lower court's interpretation of MDC's policy, which is not a sufficient basis for granting a writ of certiorari. S. Ct. Rule 10.

In addition, as with her other contentions, Winker's allegation regarding her absenteeism is factually incorrect. The District Court correctly calculated that Winker

was unavailable for work 238 days in the last year of her employment with MDC.

Even assuming Winker's calculations were accurate – that she was available for work a total 205 days, not 238 days, in her final year of employment – the District Court's conclusion that she was unqualified due to her level of absenteeism would still be appropriate. As a matter of law, an individual absent 205 of 365 days is not "qualified" for her position. *See, e.g., Moore v. Payless Shoe Source, Inc.*, 187 F.3d 845, 848 (8th Cir. 1999); and *Browning v. Liberty Mutual Ins. Co.*, 176 F.3d 1043, 1046 (8th Cir. 1999).

Moreover, Winker does not (and cannot) dispute the other facts demonstrating her lack of qualification for her position:

(i) Winker receives disability benefits in connection with which she has conceded an inability to work in any capacity;

(ii) Winker has not worked meaningfully since leaving MDC nearly six years ago;

(iii) Winker's treating physicians indicated that she cannot work regularly and that her condition will only deteriorate;

(iv) Winker has admitted that she cannot work for extended periods, has suicidal tendencies, and cannot predict her physical and mental condition from one day to the next.

Simply put, Winker is not qualified for her position, and the District Court properly granted MDC summary judgment. Winker's petition is without merit, and granting her petition for a writ of certiorari would not result in

a different outcome. Therefore, Winker's petition for a writ of certiorari should be denied.

CONCLUSION

For all of the foregoing reasons, McDonnell Douglas Corporation respectfully requests that this Court deny Petitioner Elizabeth Winker's Petition for a Writ of Certiorari.

Respectfully submitted,

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